FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 29 1958
JAMES R. BROWNING, Clerk

No. 245

In the Supreme Court of the United States

OCTOBER TERM, 1958

C. O. HANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Brown v. *United States*, 224 F. 2d 845, certiorari denied, 350 U. S. 912	12
Currier v. *United States*, 166 F. 2d 346	7
Davis v. *United States*, 226 F. 2d 331, certiorari denied, 350 U.S. 965	8
Furlong v. *United States*, 194 F. 2d 1, certiorari denied, 343 U. S. 950	12
Holland v. *United States*, 348 U. S. 121	10
Hyde v. *United States*, 225 U. S. 347	12
Mattox v. *United States*, 146 U.S. 140	12
Rakes v. *United States*, 169 F. 2d 739, certiorari denied, 335 U. S. 826	12

Statute:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b))	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 245

C. O. HANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Apeals (Pet. 1a-5a) is reported at 254 F. 2d 359.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1958 (Pet. 1a), and a petition for rehearing was denied on June 2, 1958. On June 26, 1958, the time for filing a petition for certiorari was extended by order of Mr. Justice Burton to August 1, 1958. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the indictment alleging petitioner's wilful attempted evasion of the taxes of his corporation for the year 1945 should have been dismissed for vagueness because it referred to the filing of a false and fraudulent tax return, whereas the bill of particulars and the proof disclosed that two returns had been filed, an income tax return and an excess profits tax return.

3. Whether the trial court committed any reversible error in the admission and exclusion of evidence.

4. Whether the trial court unduly limited the petitioner's cross-examination of a Treasury agent by not making available to petitioner that portion of a page of the agent's diary which related to a tax case other than petitioner's.

5. Whether the trial court erred in not affording petitioner an opportunity to interrogate the jurors as to what evidence they had considered in reaching their verdict of guilty.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat

any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

STATEMENT

On March 10, 1952, petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of wilful attempted evasion of his individual income taxes (for 1945 and 1946) and on one count of wilful attempted evasion of the 1945 taxes of the Hanson Clutch and Machinery Company, of which he was president and principal stockholder, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 11a-14a):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1945 (corporation)	$65,255 69	$43,660 95	$104,569 04	$75,781 12
1945 (individual)	18,520 42	6,500 82	63,871 83	38,306 18
1946 (individual)	20,954 29	6,873 99	60,881 28	32,519 41

After a jury trial, petitioner was found guilty on all counts. On April 12, 1957, petitioner was sentenced to concurrent prison sentences of eighteen months on each count and fined $10,000 on each count. (R. 114a-115a.)

The evidence to support the verdict may be summarized as follows:

During the prosecution years, petitioner owned 90% of the stock of the Hanson Clutch and Machinery Co.,

of which he was the operating head. The board of directors was comprised entirely of petitioner and his relatives. (R. 348a-349a.) The Treasury agents discovered, at the outset of their investigation, that there were numerous deposits to petitioner's personal bank account which could not be accounted for by the corporation's record of payments to him. (R. 334a.) The investigation later disclosed the omission of many large sales from the records of the corporation, and the diversion of the receipts of such sales by petitioner to his own use. Regular sales were generally made on an "E" series of invoices. Most of the omitted sales were made on a special series of invoices labeled "M". The use of such invoices first came to the attention of the agents when they found that one Kranz was using some Hanson equipment which had been billed on an invoice numbered M-93. The company's recorded invoices did not disclose this invoice or any other "M" invoices. Petitioner denied to the agents that there was any such series of invoices in existence. (R. 334a-338a, 642a.) However, a few days after the agents revealed their knowledge of invoice M-93, petitioner gave them a list purporting to include all of the sales billed on "M" invoices. (Govt. Ex. 14, R. 415a, 470a-471a.) This list disclosed the sale of only two large pieces of equipment, the balance being shown as small billings for such things as repairs and repair parts. The two large pieces of equipment were those sold to Kranz and the Dulaney Company, and the agents had already asked petitioner about the Kranz sale and the deposit of funds involving the Dulaney sale. (Govt. Ex. 14; R. 339a-340a.)

Not satisfied with the list furnished them by petitioner, the agents continued their investigation by trac-

ing the serial numbers of cranes missing from the company's sales records. It was found that a number of them had been sold through a third-party sales agent. Examination of the records of the sales agent disclosed the sale by petitioner's company of nine cranes and one trailer, all of which were billed on "M" invoices and none of which were recorded as sales on the company's books. (Govt. Ex. 16; R. 340a-343a.) As the investigation progressed, other large suppressed sales were unearthed, and the falsity of the list submitted to the agents by petitioner became more apparent. That list (Govt. Ex. 14) set forth 190 sales, showing the ostensible purchasers and amounts, generally only a few dollars for each sale. All of the omitted sales of cranes later discovered by the agents to have been sold on "M" invoices had numbers corresponding with those on the list. For example, the list furnished by petitioner showed a sale to an individual for $10.35 on invoice M-158; investigation disclosed that actually invoice M-158 was issued for the sale of a crane to a company for $5,228.00. (Govt. Ex. 14, R. 343a, 675a-678a.)

The proceeds of sales billed on "M" invoices were received by petitioner personally. The purchasers issued checks or bank drafts payable to the Hanson Company, but by special arrangement with his bank petitioner was permitted to cash them, even though they were usually endorsed "for deposit only" to the company account. All of the funds thus received by petitioner were either taken out of the bank by him in cash, deposited into his personal account, applied to his personal loan account at the bank, or placed by petitioner in his safe deposit box. (R. 151a-242a, 255a, 267a-323a, 344a, 356a-362a 648a-652a, 688a-689a.)

The Government's proof established that petitioner's true net income for 1945 was $92,178.33, compared

with the $18,520.42 reported on the return, an understatement of $73,657.91; and that his true net income for 1946 was $65,974.36, compared with $20,954.29 reported on the return, an understatement of $45,020.07. (Govt. Exs. 95, 95e, 96, 96d; R. 372a, 375a, 389a, 475-479a.)

Some of the cranes sold by the Hanson Company, though not reflected in the sales or cash receipts records, were included in the closing inventory at selling price. This manipulation, in effect, caused the profit on the sale of those particular items to be reported for *corporation* tax purposes. (R. 373a-374a, 457a-460a.) In 1945, however, there were seven large pieces of equipment sold which were reflected neither in the sales account nor in inventory. These seven items were responsible for the great bulk of the understatement of 1945 corporate income, amounting to $47,192.13. (Govt. Ex. 95, 95d; R. 372a-377a, 473a-474a, 646a-647a.)

Petitioner took the stand in his own defense, and testified that he had had no intention of violating the federal revenue laws but only the war-time priorities regulations promulgated by the War Production Board; that he had instructed certain employees to keep the "M" invoices and the checks received in payment thereof separate from the other records; and that in 1954, two years after the indictment was returned, he had made restitution to the company for the proceeds of the checks he had received in 1945 and 1946. (R. 611a-616a, 619a-623a.)

ARGUMENT

1. There is plainly no merit to the contention (Pet. 6-8, 11-19, 21-22, 29-30) that the evidence was insufficient to sustain the verdict. The Government proved that during the two prosecution years petitioner had

systematically diverted some $118,000 of corporate income to his own use and had reported none of it on his individual income tax returns; that these items had been billed on a separate series of invoices which were not reflected in the corporation sales or cash receipts; that the existence of this series of invoices was first denied by petitioner; that, when further questioned by the Treasury agents about two specific sales, petitioner produced a false list purporting to account for all such sales; that this list omitted virtually all of the large sales except the two that the agents had inquired about; and that, while most of the $118,000 was reported as *corporate* income by manipulation of the closing inventory figures, some $47,000 was not. (*Supra*, pp. 3-6.) As a result of these actions, petitioner's tax returns understated his true tax liability by some $85,000, and the Hanson Company's tax liability was understated by some $37,000. (Govt. Exs. 95d, 95e, 96d; R. 473a-474a, 476a, 479a.) Moreover, the Government proved the falsity of petitioner's testimony that he had been attempting to evade the material priorities regulations of the War Production Board rather than the internal revenue laws. It was shown that purchasers of the machinery in question needed no priorities after September 30, 1945; that all but two of the suppressed sales were made after that date; and that one of those two purchasers did, in fact, have a priority. (Govt. Exs. 95, 96, 119, 122, p. 12487; Deft. Ex. W; R. 675a, 698a-700a, 711a.)[1]

---

[1] Petitioner's version of the facts (Pet. 11-19) is based mainly on his own testimony, which the jury must be assumed to have rejected. In view of the Government's evidence of current corporate earnings or profits available for dividend purposes (Govt. Exs. 95d, 95e; R. 475a-479a), petitioner, seeking to distinguish *Cuzzo v. United States*, 166 F. 2d 346 (C.A. 1st) and *Davis v. United States*,

2. The contention (Pet. 7, 11) that the indictment alleging petitioner's attempted evasion of the corporation's 1945 taxes should have been dismissed for vagueness is equally without merit. The indictment (R. 11a-12a) alleged that the means of evasion was the filing of a false and fraudulent tax return. The corporation had, in fact, filed two returns for that year, an income and declared value excess profits tax return, and an excess profits tax return. (Govt. Exs. 90, 90a.) However, petitioner could not have been misled. The charging part of the indictment refers to "the taxes" due and owing by the corporation (as contrasted with the phrase "income tax" used in the indictment alleging evasion of petitioner's individual tax liability), thus embracing all of the federal corporate taxes due for that year—income tax, declared value excess profits tax, and excess profits tax. Moreover, the reported income figure stated in the indictment appears on *both* returns, and the reported tax figure there stated is the *total* of the taxes reported on the two returns. The Court of Appeals was plainly right in holding that the indictment was "sufficient to enable appellant to prepare his defense and protect him against a second prosecution for the same offense". (Pet. 5a.) Any conceivable confusion was obviated by the Government's bill of particulars, which clearly informed petitioner that all three kinds of taxes were involved. (R. 19a-20a.)

---

226 F. 2d 331 (C.A. 6th), certiorari denied, 350 U.S. 965, contends (Pet. 6-7; 29-30) that the Government erred in treating as a constructive dividend corporate income diverted by petitioner to his own use, because there can be no constructive dividend without a depletion of the corporate assets. The fallacy is patent. The corporate assets *were* depleted. The inclusion in the corporation's closing inventory of some of the machinery sold on "M" invoices was false. The machinery was gone and petitioner had pocketed the proceeds. (*Supra*, pp. 4-5.)

Finally, it should be noted that the prison sentence imposed with respect to this count runs concurrently with those imposed on the other two counts. (*Supra*, p. 3.)

3. Petitioner raises three points concerning the admission and exclusion of evidence, none of which has substance.

(a) Petitioner argues (Pet. 7, 22-23) that the trial court erred in permitting enlargements of the Government's summaries of alleged unreported income and tax deficiencies to be placed before the jury during the examination of the two Treasury agents who had prepared them and during the cross-examination and redirect examination of petitioner (R. 353a, 491a, 634a). The originals of these enlargements were admitted in evidence for the limited purpose of illustration, and not as evidence of the facts. (Govt. Exs. 95, 95a, 95d, 95e, 96, 96a, 96d; R. 352a-353a, 366a, 368a, 378a, 383a, 384a, 386a.) As each enlargement was produced, the trial court cautioned the jury repeatedly that these summary charts were being used for purposes of illustration only, i.e., to clarify the testimony of the agent; that they were not to be considered as evidence; and that if they contained anything which did not conform to the evidence they were to be disregarded. (R. 366a, 368a, 378a, 383a, 384a, 386a.) Use of the charts was permitted during the cross-examination of petitioner, in order that his attention might be called to particular items, and defense counsel himself found them useful during petitioner's redirect examination. (R. 634a, 690a.) Later, at the request of defense counsel, the charts were turned away from the jury's view. (R. 734a.) In his final charge to the jury, the trial judge gave careful, detailed "guarding instructions" about

the use to which the schedules were to be put (R. 68a.). See *Holland v. United States*, 348 U. S. 121, 127-128.

(b) Petitioner contends (Pet. 7-8, 19-20, 30) that the trial court erred in excluding from evidence Defendant's Exhibit SS for Identification, which consisted of a contract between petitioner and his corporation, dated April 30, 1954, under which he agreed to make restitution for the amount of corporate funds diverted by him, and an attached summary showing the computation of the amount ($99,985.05) (R. 128a-138a, 619a, 696a). The document was properly excluded because (1) it contained many self-serving statements as to which no evidence had been introduced; (2) having been prepared in 1954, two years after the indictment was returned, it could hardly shed light on petitioner's intent in 1945 and 1946; and (3) in view of petitioner's ownership of over 90% of the corporation's stock, the contract was little more than an agreement which he had made with himself. (R. 112a-113a, 128a, 140a, 619a.) Moreover, the exclusion of this exhibit could not have prejudiced petitioner because he was permitted to testify to the drawing of the agreement and to his return of the funds to the corporation pursuant to the agreement. (R. 619a.)

(c) Petitioner urges (Pet. 3-5, 25, 31) that the trial court erred in permitting the Government to show, on rebuttal, that the company had made two large suppressed sales not listed in the bills of particulars and not referred to in the previous testimony (Govt. Exs. 117, 117a, 118; R. 712a-717a, 722a-723a, 738a-739a). The evidence was received on the issue of petitioner's intent, and the proceeds of these sales were not included in the Government's summaries of unreported income. (R. 716a-717a.) The trial court was clearly correct. Petitioner told the jury that he had received the pro-

ceeds from all the sales on "M" invoices, that he had restored all of the diverted funds to the company, and that he had now accounted for all such sales. (R. 611a-623a, 648a-649a.) The Government's proof of the two newly discovered (R. 712a-713a, 722a-723a) sales tended to rebut this testimony.[2]

4. The argument (Pet. 3, 23-24, 28-29) that the conviction should be reversed because defense counsel was not afforded an opportunity to inspect a page of a diary kept by one of the Treasury agents has no merit. Petitioner's purpose was to impeach the agent's testimony that the investigation of petitioner was under way as early as October 25, 1948, when he first interviewed petitioner. (R. 402a-403a.) Actually, the diary extract supported that testimony, because it disclosed that the agent warned petitioner of his constitutional rights at that very interview. (R. 412a-413a.) Petitioner makes no attempt to show that he may have been prejudiced by the incident, or indeed that it was of any importance at all. Moreover, he got all he was entitled to. The pertinent diary extract was copied and turned over to him. (R. 403a-404a, 406a.) The only portion of that page withheld related to another case which the agent happened to be investigating at the same time. (R. 401a-404a, 405a-407a.)

5. The contention (Pet. 5-6, 26-27) that petitioner should have been granted a hearing for the purpose of interrogating the jurors as to the basis for their verdict

---

[2] Petitioner's complaint (Pet. 25, 31) that the Government failed to prove that these two machines were paid for goes to the weight of the evidence rather than its admissibility. If, in fact, they were not paid for (a highly unlikely possibility) petitioner was free so to testify. He did state on surrebuttal that he had no knowledge of receiving the proceeds of these sales (R. 738a), but the defense requested no continuance in order to check the matter.

and the nature of their deliberations is frivolous. *Hyde v. United States*, 225 U. S. 347, 383-384; *Mattox v. United States*, 146 U. S. 140, 149; *Brown v. United States*, 224 F. 2d 845 (C.A. 6th), certiorari denied, 350 U. S. 912; *Furlong v. United States*, 194 F. 2d 1, 4 (C. A. 7th), certiorari denied, 343 U. S. 950. Cf. *Rakes v. United States*, 169 F. 2d 739, 745 (C. A. 4th), certiorari denied, 335 U. S. 826.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

AUGUST, 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958